

Remarks

Applicant gratefully acknowledges the allowance of claims 1-9, 11, 14, 24-29, 31, and 34. Claims 1-9, 11, 14, 15 17, 21-29, 31, and 34 remain in this application. Claims 10, 12, 13, 16-18, 20, 30, 32, and 33 have been previously canceled. Claim 15 is amended to state the ready-to-eat cereal comprises a cereal grain selected from the group consisting of corn, rye, and rice.

Rejection Under 35 USC §112

Claims 15 and 21-23 were rejected under 35 USC §112, first paragraph, as failing to comply with the enablement requirement. As stated in the Office Action,

"The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it to which it pertains, or with which it is most nearly connected, to make and/or use the invention. No basis is seen in the specification for excluding wheat from the Markush grouping."

The Markush group in question is "...a cereal selected from the group consisting of corn, rye, rice, barley and mixtures thereof..." Previously, the group included wheat. Markush practice is a means of introducing alternative expressions. This claim could also have been written, "...wherein a cereal is corn, rye, rice, barley and mixtures thereof..." Further, each cereal may be a claim unto itself, as,

Claim P ...comprising a cereal grain of wheat...
Claim Q ...comprising a cereal grain of corn....
Claim R ...comprising a cereal grain of rice....
Claim S ...comprising a cereal grain of barley....

Applicant asserts that the above Claim P can be canceled from the application and both the claims and the description satisfy the enablement requirement. Applicant is not aware of any case law or any statement in the MPEP that states that the claims and description are not enabled due to one member of a Markush group being removed. Applicant asserts having the right to exclude wheat from the Markush group on the grounds of claiming more than he is entitled to claim. Reconsideration and withdrawal of this ground of rejection is respectfully requested.

Rejection Under 35 USC §103(a)

Claims 15 and 21-23 are rejected under 35 USC §103(a) as being unpatentable over Dutilh (US 4,608,267).

As stated in the Office Action, Dutilh discloses a composition containing choline-fortified cereal, wheat bran and honey. In this Example 3, wheat bran and honey are thoroughly mixed with lecithin and the mixture was extruded at 150°C and the extruded material cut into bits that could be eaten as breakfast cereal with milk. The term "bran" is defined as the outer coating of many grains. Bran is not a cereal grain, but rather derived from a cereal grain. Bran is a component of a cereal grain and not the cereal grain itself. Wullschleger et al. is also cited against claims 15 and 221-23. In col. 3 lines 32-33 of Wullschleger et al., it states "...grain components such as wheat germ and brans including oat bran, wheat bran, etc...." Thus bran is not a cereal grain, but rather derived from a cereal grain. The cereal grains of present claim 15 are not bran.

Example II of the present invention is similar to Example 3 of Dutilh, with the exception that Dutilh uses wheat bran and the present invention uses corn cones, a fine corn meal. In Example II, unacceptable choline fortified, extruded pellets are obtained. More specifically, the choline fortified, corn extruded pellets exiting the extruder lack elasticity, which causes the pellets to shred at the flaking rolls, thereby making it difficult to produce flakes. The resulting flakes appear raw in color and do not toast. With respect to flavor, the flakes impart an off-flavor or lecithin flavor and are very dry tasting. The texture of the flakes is undesirable. Particularly, the flakes are too tender and demonstrate a poor bowl life.

This comparison of Example 3 of Dutilh and Example II of the present invention demonstrates that the wheat bran of Dutilh cannot be replaced with corn cones to obtain an acceptable product. To repeat Dutilh's Example 3 using corn cones gives the product of Example II in the present invention, and this product is unacceptable for the above reasons.

In order for the Office to show a *prima facie* case of obviousness, M.P.E.P. §2143 requires that the Office must meet three criteria: (1) the prior art reference must teach or suggest all of the claim limitations; (2) there must be some suggestion or motivation, either in the reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference, and (3) there must be some reasonable expectation of success. The Office has clearly failed to meet its burden under (1) and/or (2) above, since the teachings of Dutilh fail

to teach or suggest all of the claim limitations of the present claims 15 and 21-22. Reconsideration and withdrawal of this ground of rejection is respectfully requested.

Composition claim 15 is rejected under 35 USC §103(a) as being unpatentable over CN 1,271,539 A (Lu et al.).

As stated in the Office Action, "Lu et al. disclose an instant barley gruel containing lecithin in amounts of 1-5%, which has been extruded and puffed, then crushed. The present cereal grain, as amended, does not included barley.

In order for the Office to show a *prima facie* case of obviousness, M.P.E.P. §2143 requires that the Office must meet three criteria: (1) the prior art reference must teach or suggest all of the claim limitations; (2) there must be some suggestion or motivation, either in the reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference, and (3) there must be some reasonable expectation of success. The Office has clearly failed to meet its burden under (1) and/or (2) above, since the teachings of the Lu et al. fail to teach or suggest all of the claim limitations of the present claims. Reconsideration and withdrawal of this ground of rejection is respectfully requested.

Composition claims 15, 17, 20, 21, and 23 are rejected under 35 USC §103(a) as being unpatentable over Wullschleger et al. (US 5,227,248).

Wullschleger et al. relate to a breakfast cereal which contains a quantity of psyllium sufficient to provide a hypocholesterolemic effect. The psyllium concentrataion in the finished cereal product is at least 2% by dry weight basis. Compare this to the present invention that does not contain psyllium. One would not look to the teachings of Wullschleger et al. that uses psyllium to arrive at the present invention that has no psyllium. Clearly, Wullschleger et al. teach away from the present invention. A reference which leads one of ordinary skill in the art away from the claimed invention cannot render it unpatentably obvious. *Dow Chem. Co. v. American Cyanamid Co.* (CAFC 1987) 816 F2d 617, 2 USPQ2d 1350; *In re Grasseli et al.* (CAFC 1983) 713 F2d 731, 218 USPQ 269; *In re Dow Chemical Co.* (CAFC 1988) 837 F2d 469, 5 USPQ2d 1529.

In order for the Office to show a *prima facie* case of obviousness, M.P.E.P. §2143 requires that the Office must meet three criteria: (1) the prior art reference must teach or suggest

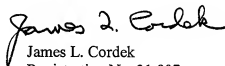
all of the claim limitations; (2) there must be some suggestion or motivation, either in the reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference, and (3) there must be some reasonable expectation of success. The Office has clearly failed to meet its burden under (1) and/or (2) above, since the teachings of Wulschleger et al. fail to teach or suggest all of the claim limitations of the present claims. Reconsideration and withdrawal of this ground of rejection is respectfully requested.

For the foregoing reasons, it is submitted that the present claims are in condition for allowance. The foregoing remarks are believed to be a full and complete response to the outstanding office action. Therefore favorable reconsideration and allowance are respectfully requested. If for any reason the Examiner believes a telephone conference would expedite the prosecution of this application, it is respectfully requested that he call Applicant's representative at 314.982.2409.

If any additional fees are due in connection with the filing of this document, the Commissioner is authorized to charge those fees to our Deposit Account No. 50-0421.

Respectfully submitted,
SOLAE, LLC

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James L. Cordek
Registration No. 31,807

PO Box 88940
St. Louis, MO 63188
314.659.3218